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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KIN SUN YUEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE TRIAL COURT IN AN EXTORTION TRIAL ABUSED ITS DISCRETION BY ADMITTING EXTRINSIC ACT EVIDENCE LINKING THE PETITIONER TO ANOTHER EXTORTION WHERE THE GOVERNMENT AND TRIAL COURT FAILED TO ARTICULATE PRECISE AND PROPER REASONS WHY THE PROBATIVE VALUE FOR AN ISSUE IN CONTENTION OUTWEIGHED THE PREJUDICIAL VALUE AND WHERE THE EVIDENCE THEREBY DEMONSTRATED CRIMINAL PROPENSITY ONLY.

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Kin Sun Yuen respectfully petitions the Supreme Court for the United States for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered in Case No. 85-5542 of that Court on December 31, 1986, which affirmed the judgment of the U.S. District Court in the Southern District of Florida finding Kin Sun Yuen guilty of criminal offenses against the United States.

JUDGMENT BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit rendered December 31, 1986 and entered on the same day affirming the Petitioner's conviction is attached hereto.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, United States Code, Section 1259.

STATEMENT OF THE CASE

In the evening of September 6, 1983, Winston and Moy Lee were attacked by three gunmen in their home in Fort Lauderdale, Florida. The Lees are the owners and proprietors of a Chinese Restaurant called Moy Lee's. Living with them in their home was Eve Lee (15-year-old granddaughter of the Lees) and Louis Turturo, a family friend who was a temporary resident in the house. The three gunmen were later identified as Mon San Chong a/k/a Boon San Chong (hereinafter "Chong"), Lee Pung Chung a/k/a Johnson (hereinafter "Chung"), and Goy Yit Nam a/k/a Ah Lamb (hereinafter "Nam").

The victim witnesses claimed that the gunmen made reference to having a boss. Chong was identified as having a walkie-talkie which he used to give the phone number for the Lees to an unidentified third party. During the ensuing several hours, the Lees' phone would ring and various gunmen would talk in Chinese to the individual on the other end. The Lees testified that none of them had ever seen any of the gunmen before they were attacked. There was testimony, however, from the victim witnesses that the gunmen appeared to know a lot about them. Winston Lee recalls being addressed as "Kow Sook" while his wife was addressed as "Kow Soom." It was revealed in cross-examination, however, that the recited names were Chinese forms of familiar address and respect and used by many of the employees of the Lees over the years.

Winston Lee testified that on one occasion he answered the phone when it rang and a voice said, "Kow Sook, I don't want to talk to you." Mr. Lee could not recognize the voice but claims to have found it familiar.

The three gunmen demanded $200,000.00 from the Lees for protection. The Lees stated repeatedly that they did not have that amount of money available. Mr. Lee claims he was able to "bargain" the demand down to $60,000.00. The Lees insisted that no money was located in the house, but there might be some funds in safe deposit boxes at their bank. The gunmen waited all night with Mr. and Mrs. Lee, Louis Turturo, and Eve. After much consultation, the gunmen agreed that one of them would accompany somebody to the bank in order to see if there was any money in the safe deposit boxes.

Ella Lee, the Lees' daughter, was called by her mother, Mrs. Lee, and asked to come to the house. Upon her arrival, she was recruited to accompany Chung to the bank. The first trip was unsuccessful because there was no money in the safe deposit box.

After much discussion back at the Lees' residence, it was decided that Ella Lee would return to the bank with Chung and cash a $4,000.00 check. Mr. Lee testified that the gunmen told him that they expected weekly payments of $3,000.00 as protection money. The gunmen left after warning the Lees not to contact the police.

Approximately one week later, Chong and Chung made telephonic contact with the Lees to facilitate the collection of more money. Meanwhile, the FBI had been contacted and with the consent of the Lees

had attached a tape recorder to their telephone. When the rendezvous was arranged, it turned out to be a trap for Chong and Chung and they were arrested. The Government conceded that the Petitioner had no involvement in the second trip. That trip was charged in Count IV, which was dismissed upon Motion of the Government.

The Lees also testified that they knew the Petitioner and that his nickname was Mr. Sing. They stated that the Petitioner worked for them as a waiter when they first opened the restaurant in 1974. He only stayed for a couple of years and then moved on. Ella Lee testified that a man named Lo Gon Kee was also an employee at the restaurant at the beginning and lent the Petitioner some money for which a disagreement later arose. This testimony was offered by the Government in an effort to establish some sort of motive for the Petitioner's involvement in the instant offense. What the Lees failed to reveal was that they had incurred extensive gambling debts to Chinese from New York. Chong, Chung, and Nam were all from New York. Petitioner was from Tampa.

Numerous telephone toll records from the Petitioner's residence were admitted into evidence in order to establish that telephone calls were made from that residence to other telephone numbers which Special Agent Overmyer of the FBI was permitted to attribute to other co-conspirators such as Chong, Chung, and Nam. These calls occurred from September 1 through 5, 1983. No proper foundation was laid for the introduction of these telephone toll records. The identity of the speakers was never established by any standard. In addition, Special Agent Overmyer was imporperly permitted to offer his opinion as to

which individuals had made what phone calls without even establishing who resided at the various phone numbers whose toll records were offered in evidence.

Chung's girlfriend, Christine Marie Donnelly, who testified that when Chung went down to Florida around September 12, 1983 and did not return, she called the Petitioner's phone number in Tampa because it was in Chung's phone book. Likewise, a phone book attributed to Chong was admitted into evidence containing the phone number attributed to the Petitioner.

The only witness who was able to offer any testimony relating to telephone conversations with the Petitioner was Chung. He did not identify specific phone calls on any of the Government exhibits that purported to be toll records.

Almost the entire case presented by the Government against the Petitioner was based on the testimony of Chung. Chung testified that he met the Petitioner through Nam in New York. Chung stated that the Petitioner planned the operation. Chung said that the Petitioner who was the unidentified third party on the telephone instructing them while they were in the Lees' residence. He further testified that the Lees were chosen because they had lots of money. The Petitioner was the one who supposedly drove Chung and the other co-defendants around.

Chung had also been charged by the State of Florida with armed robbery in connection with another extortion of a Chinese family called the Au's in Fort Lauderdale in July 1983. He claimed that the Petitioner functioned as the "outside man" for the robbery of the Au's. The so-called Au incident was

proven at this trial by the Government and admitted under Rule 404(b) as being probative to the issue of identity and *modus operandi*. The Government claimed that there was at least another extortion in the Baltimore, Maryland area which they sought to admit under 404(b). Ultimately, the jury was not permitted to hear any extrinsic evidence regarding the Baltimore incident except for the cross-examination of Nam when he testified in his own defense. He was asked specifically about committing a robbery with Chung and Chong in Maryland.

There were several discussions between Judge Roettger and trial counsel relating to the advisability of admitting evidence of the Au incident under 404(b). Judge Roettger was impressed with what he perceived to be the Government's need for this evidence especially as it pertained to the Au incident. He also erroneously and improperly concluded that Chung was not testifying candidly as a Government witness, and that his apparent reluctance operated to increase the need for the admission of 404(b).

In order to buttress the connection between the Au incident and the Petitioner, the Government offered a registration card for the Fort Lauderdale Beach Hotel. That registration card reflected that a Kin Sun Yuen had checked in on July 24, 1983, shortly before the Au incident. The admission of this document was objected to by Petitioner's trial counsel. There was no evidence from any employee at the hotel that sought to confirm that it was the Petitioner, and not someone else using his name, who had checked into the hotel. Handwritting exemplars had been obtained prior to trial, but the analysis was inconclusive.

It appears very clear from the Record that the only benefit and effect that justified Chung's description of Petitioner's actions relative to the Au incident was to establish criminal propensity on the part of the Petitioner. The superficial similarities between the way in which both offenses were committed was only enough to endow the 404(b) evidence with slight probative value far outweighed by the overwhelmingly unfair prejudice that resulted from the jury hearing that the Petitioner had committed not just this one offense, but another one. In addition, Chung spoke about the Au incident at great length. On rebuttal, the Government was permitted to bring forward Lai Ho Au to testify in some great detail of the incident involving her family. The toll records of the Petitioner and Chung were admitted in order to present alleged connections between co-conspirators around the time of the Lee incident charged in the indictment and the Au incident. The controversy surrounding the hotel registration card only applied to the Au incident. Obviously, a lot of additional time was taken by the Court to permit the Government to prove the Petitioner's connection with the Au incident. The Petitioner could not have received a fair trail considering the quality of Chung's testimony and his willingness to implicate the Petitioner in other robberies for which no competent corroborating evidence was admitted.

What is particularly disturbing is the fact that the only issue for the jury to decide was the identity of Mr. Sing. There was no dispute as to the necessity of presenting evidence of intent in an extortion case where identity of the perpetrator is assumed. The Government and trial court relied on the superficial

similarity of the two incidents (charged—Lee, and uncharged—Au) to make a record as pertained to identity. Later, when the Petitioner presented compelling law devastating the assertion that these extortions contained "signature" similarities, the Government argued that intent was an issue and the apparently loose standard for admitting extrinsic act evidence for the purpose of showing intent was urged upon the Eleventh Circuit. The concept that the trial court's discretion to admit this highly prejudicial extrinsic act evidence would be reviewed upon grounds never raised before the trial court apparently prevailed upon the Eleventh Circuit.

Petitioner's trial counsel obviously defended his client on the issue of identity. He introduced the Petitioner's passport into evidence in order to establish his non-involvement in the second extortion attempt by Chung and Chong. He moved into evidence more pages from Chong's phone book to demonstrate that amongst the Chinese "Sing", is a common nickname. He was unable to enter into evidence an FBI "302" which purported to prove an interview with an Albert Yap, who told Special Agent Kruss that he had seen Nam with a Mr. Sing, who was not the Petitioner. The true identity of the so-called "outside" man was the only genuine issue of fact for the jury to decide as to the guilt or innocence of the Petitioner.

Kin Sun Yuen was charged in a four-count second superceding indictment with conspiracy to extort and extortion in violation of 18 U.S.C. Section 1951 (Counts I and II), use of a firearm during the commission of a felony in violation of 18 U.S.C. Section 924(c)(1) (Count III), and conspiracy to extort in violation of 18 U.S.C. Section 1951 (Count IV). The

indictment which charged the Petitioner was filed on June 6, 1984. The principle difference between this third indictment and its two predecessors was the inclusion of the Petitioner. Lee Pung Chung had already pled guilty to the indictment on May 18, 1984, and had identified the Petitioner as the "Mr. Sing," who directed the extortion scheme. In Mid-June 1984, the Petitioner was arrested in the Middle District of Florida.

On February 12, 1985, Chung was sentenced by Judge Roettger. He received the maximum ten-year sentence for his plea to Count III. His agreement specified that Counts I, II, and IV would not be dismissed until after he had testified against his co-defendants. Judge Roettger also invited him to file a Motion to Reduce Sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure after he had testified against the co-defendants. Despite the use of language in the plea agreement and in the plea colloquy that any mitigation of sentence or dismissal of counts would be based only upon truthful testimony, it was clear that Chung was to testify in such a manner that his co-defendants were convicted, and upon those convictions, he would be rewarded.

On February 21, 1985, this cause came to trial before a jury in the U.S. District Courthouse in Fort Lauderdale, Florida. At the conclusion of the Government's case, the Petitioner made a Motion for Judgment of Acquittal, which was denied. After offering some evidence, the Petitioner rested and renewed his Motion for Judgment of Acquittal, which was also denied. On February 28, 1985, the jury returned a guilty verdict against the Petitioner on Counts I, II, and III. Count IV had been previously

dismissed by the Government due to the conceded non-involvement of the Petition in the circumstances surrounding the charge.

On June 14, 1985, the Petitioner was sentenced to twenty years on Counts I and II, and ten years on Count III. These sentences of confinement were to run consecutive with each other for a total sentence of fifty years incarceration. A timely Notice of Appeal was filed. The case went before the United States Court of Appeals for the Eleventh Circuit.

The Petitioner raised seven issues on appeal: (1) That the trial court erred in admitting extrinsic act evidence linking the Petitioner to the so-called Au incident; (2) That the trial erred in refusing to strike the testimony of Chong because of the due process implications of his plea bargain with the Government; (3) That the opinion testimony which accompanied the admission of the telephone toll records in this case was improper and usurped the jury's function; (4) That the trial court erred in refusing to sever Petitioner from his co-defendant Nam when he committed obvious perjury during his testimony; (5) That the trial court erred in admitting the hotel register card pertaining to the Au incident to prove Petitioner signed his name thereto; (6) That the trial court denied Petitioner his right to pursue a defense by excluding reliable hearsay contained in a police report and the transcript of Chong's sentencing colloquy; and (7) That the evidence, in light of all the errors asserted, was insufficient to convict. The matter came to be heard in oral argument before a panel of the Eleventh Circuit. On December 31, 1986, the Petitioner's conviction was affirmed *per curiam* pursuant to Rule 25 of

the Rules of the Eleventh Circuit. Rule 25 state in pertinent part:

> When the Court determines that any of the following circumstances exist: (a) Judgment of a district court is based on findings of fact that are not clearly erroneous; (b) the evidence in support of a jury verdict is not insufficient . . . and the court also determines that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Despite this treatment by the Eleventh Circuit, Petitioner contends that the trial court did not properly balance legitimate concerns over the admissibility of the Petitioner's alleged involvement in the so-called Au incident. By utilizing improper criteria and displaying a desire that any evidence that would ensure the Petitioner's conviction be admitted, the trial court was not properly utilizing its discretion. Consequently, the trial court could not properly have determined whether the prejudice suffered by the Petitioner by the admission of such evidence was unfair. Any probative value that can be given to extrinsic act evidence based on all the elements of an offense can justify admissibility in the Eleventh Circuit. In the Ninth Circuit, extrinsic act evidence must be relevant to an issue in contention, not just any issue. The Government is therefore required to articulate its precise hypothesis justifying admissibility. The trail court must then make the appropriate findings. The acceptance of the aforementioned principle by the Eleventh Circuit may explain why this case was decided under Rule 25 of the Rules of the Eleventh Circuit.

The fact that the trial judge utilized improper criteria for weighing the probative value and unfair prejudice lacks precedential value where the law permits the appeals court to substitute its judgment for that of the errant trial court and conduct its own balancing test without consideration for the issues actually raised at trial.

The Supreme Court has never granted *certiorari* on a case wherein the admissibility of extrinsic act evidence under Rule 404(b) of the Federal Rules of Evidence was an issue. Despite the discretion accorded trail courts in determining the admissibility of evidence before them, the utilization of extrinsic act evidence has mushroomed over the past nine years. The admission of other crimes or bad acts perpetrated by defendants on trial has become a regular feature of Federal criminal cases. The emphasis placed on such evidence by the Government has led to its abuse. Situations arise such as occurred in the instant case wherein the Government presents evidence to convince the jury a defendant is guilty of an uncharged crime, and then ask the jury to transfer that finding to the charged offense and return a verdict of guilty. In the Eleventh Circuit, giving the appeals court the right to apply *Beechum*'s probative value standard without regard to the realities of the trail creates miscarriages of justice such as in this case. If the trial judge had been forced to justify the logical relevancy of the Au incident to the charged crime, as would be required in the Ninth Circuit, then the appeals court would have been confronted with the fact that the only purpose of this evidence was to show criminal propensity.

This issue is therefore ripe for discussion before the Supreme Court. A return to the basic principle that a criminal defendant is entitled to be tried for the offense charged is needed and a decision affirming that principle by this Court is necessary for the proper administration of justice.

ARGUMENT

THAT THE TRIAL COURT IN AN EXTORTION TRIAL ABUSED ITS DISCRETION BY ADMITTING EXTRINSIC ACT EVIDENCE LINKING THE PETITIONER TO ANOTHER EXTORTION WHERE THE GOVERNMENT AND THE TRIAL COURT FAILED TO ARTICULATE PRECISE AND PROPER REASONS WHY THE PROBATIVE VALUE OUTWEIGH THE PREJUDICIAL VALUE FOR AN ISSUE IN CONTENTION AND THE EVIDENCE THEREBY DEMONSTRATED CRIMINAL PROPENSITY ONLY.

Rule 404(b) of the Federal Rules of Evidence provides in pertinent part:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The landmark case from the Fifth Circuit that presented the two-tier analysis for evaluating the admissibility of evidence under 404(b) was *United States v. Beechum,* 582 F.2d 898 (5th Cir. 1978) (*en banc*). While *Beechum* presented a comprehensive treatment

of so-called similar act evidence, the holding in *Beechum* pertained exclusively to the use of extrinsic offenses to prove intent. *Id.* at 911 n. 15. The significance of this distinction lies in the fact that what makes an extrinsic offense probative to intent is when said extrinsic offense involves the same state of mind as that of the charged offense.

The *Beechum* Court discusses in footnote 15 the different criteria used for determining the admissibility of extrinsic act evidence that is relevant in other contexts besides intent.

> The identity of the defendant may be established by evidence of offenses extrinsic to the indictment. In this instance, the likeness of the offenses is the crucial consideration. The physical similarity must be such that it marks the offenses as the handiwork of the accused. In other words, the evidence must demonstrate a *modus operandi.*

582 F.2d at 912 n. 15.

Thus, on the issue of identity, the *Beechum* Court did not overrule or even change previously decided Fifth Circuit cases that analyze the admissibility of extrinsic act evidence. *United States v. Myers,* 550 F.2d 1036 (5th Cir.) *cert. denied* 439 U.S. 847 (1977); *United States v. Goodwin,* 492 F.2d 1141 (5th Cir. 1974); *United States v. Alston,* 460 F.2d 48 (5th Cir. 1972).

In *Goodwin,* the Fifth Circuit stated that courts had admitted extrinsic act evidence to show a defendant's design or plan to commit the specific crime charged, but never to show a design or plan to commit "crimes

of the sort with which he is charged." 492 F.2d at 1153. As the *Goodwin* Court continues:

> Thus, proof of design or plan by showing the commission of similar acts requires more than merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. Thus, where the act of passing counterfeit money is conceded, and the intent alone is an issue, the fact of two previous utterings in the same month might well tend to negative intent; but where the very act of uttering is disputed as, where the defendant claims that his identity has been mistaken, and the object is to show that he had a general system or plan of working off a quantity of counterfeit money and did carry it out in this instance, the fact of two previous utterings may be in itself of trifling and inadequate significance.

492 F.2d at 11532.

The Eleventh Circuit itself has distinguished post-*Beechum* the admissibility of extrinsic act evidence on the issue of intent and identity. *United States v. Dothard,* 666 F.2d 498 (11th Cir. 1982). In *Dothard,* the defendant was charged with making a false statement. The Eleventh Circuit reversed because the extrinsic act evidence of other false statements made on applications was determined to lack the nexus necessary to make it relevant as a common plan or scheme to make false statements on applications. *Id.* at 503.

The Fourth Circuit in the case of *United States v. Johnson,* 610 F.2d 194 (4th Cir. 1979) considered an issue similar to the one in the instant case. The *Johnson* case involved a bank robbery prosecution wherein three defendants were charged, and one had agreed to cooperate and testify as a Government witness. During the course of the cooperating witness' testimony, another bank robbery was uncovered for the jury. The cooperating witness stated that the third defendant, Johnson, was with him when that other bank was robbed. Although the Court recognized the unfair prejudice to the defendant by reference to the other bank robbery, it found two distinguishing characteristics that justified affirming the convictions. Firstly, the jury was admonished to disregard any reference to Johnson's involvement in the other bank robbery. Secondly, the Court determined that the evidence against Johnson presented by other witnesses was overwhelming. Thirdly, the complained of testimony occurred during a defendant's cross-examination and not as a result of Government questioning. Nonetheless, Judge Widener issued a well-reasoned dissent. *Id.* at 197. There was no limiting instruction in the instant case.

In the case of *United States v. Bailleaux,* 685 F.2d 1105 (9th Cir. 1982), the Court was considering the application of another extortion crime as an extrinsic offense admissible under 404(b) to show identity. In that case, the extortion plan revolved around poisoning of food items in a store followed by a demand of diamonds to forestall further poisonings. The type of poison used, the method of contacting the extortionist and even the wording of the extortion notes were similar enough in the unique aspects of the case

to be probative on the charged offense. Nonetheless, the Ninth Circuit only allowed it to be admitted for the purpose of establishing identity after determining (1) that the proof of the extrinsic offense was clear and convincing involving as it did many witnesses, and (2) the defendant had taken the stand and testified and denied that he had committed the extrinsic offense.

The *Bailleaux* opinion ought to be considered as an updated look at the Fifth Circuit's opinion in *United States v. Myers, supra. Myers* was a bank robbery prosecution wherein the Government sought to admit evidence of another bank robbery in order to prove that the defendant committed the charged bank robbery. The excuse offered by the Government and rejected by the Court was that there was a characteristic *modus operandi* tying one bank robbery with the other. *Id.* at 1045.

> The probity of evidence of other crimes where introduced for this purpose depends on both the uniqueness of the *modus operandi* and the degree of similarity between the charged crime and the uncharged crime. Of course, it is not necessary that the charged crime and the other crimes be identical in every detail. But they must possess a common feature or features that make it very likely that the unknown perpetrator of the charged crime and the known perpetrator of the charged crime are the same person.

Id.

In the *Myers* case, the Government asserted several so-called similarities to justify its admission. After

considering each one in turn, the Fifth Circuit concluded that:

> [T]he assertion that Coffie and Myers robbed both banks begs the question which the evidence of the uncharged crime is supposed to help us to answer: whether Myers perpetrated the Florida robbery. Moreover, the number and gender of employees present can only be a circumstance controlled by the robbers if they timed the robbery to coincide with the presence of such employees. Thus the time of the robbery in the presence of only a few female employees really constitute only a single common feature. Equally significant is the fact that each of the eight remaining similarities is a common component of armed bank robberies.

Id. at 1046.

In the instant case, the Petitioner did not testify in his own case therefore did not open the door to any extrinsic offense issue as in *Bailleaux*. In addition, the similarities as argued by the Government are components of extortion in general and not necessarily this extortion in particular as in *Myers*. The fact that Chung provided the only evidence of the Petitioner's alleged involvement in the Au incident bets the question of whether or not the Petitioner had any involvement at all in the Lee incident where his only accuser was again the cooperating witness Chung. The similarities were not of a peculiar, unique, or bizarre nature as to mark them as the handiwork of the same individual giving the testimony relating to the Au incident only slight probative value. *United States v. Goodwin, supra* at 1154.

The Government argued on appeal that the evidence relating to the Au incident was probative towards the charged offense as it reflected on the issue of intent. It was implied because intent is always an issue in any conspiracy case (such as a conspiracy to extort), it is necessarily admissible. The Petitioner contends that such an analysis of the probative value of evidence indicating intent is the functional equivalent of criminal propensity. In *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978), the Fifth Circuit held that "the materiality of intent depends, not on the statutory definition of the offense, but on the circumstances of the case and on the nature of the defense." *Id.* at 148. However, *Silva* was decided before *Beechum*.

A later Fifth Circuit case, *United States v. Roberts*, 619 F.2d 379 (5th Cir. 1980), interpreted some of the words of the *Beechum* decision as rejecting the quoted part of *Silva*. Specifically, *Roberts* quoting *Beechum* stated: "Although it would seem that the extrinsic offense would be irrelevant if the issue of intent were not contested, the rules apparently deem evidence that has probative force with regard to an uncontested issue to be relevant." *United States v. Beechum, supra* at 914, n. 19, cited in *United States v. Roberts, supra* at 382, n. 1.

A successor case to the *Roberts* decision candidly admits that the Ninth Circuit in particular does not follow the reasoning indicated that extrinsic act evidence which is probative of intent will overcome any unfair prejudice asserted even when the defense does not dispute intent. *United States v. Kopituk*, 690 F.2d 1289, 1334 (11th Cir. 1982) citing *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978). The Eleventh

Circuit has displayed some uncertainty on this point as evidenced by its decision in *United States v. Russo* 717 F.2d 545, 552 (11th Cir. 1983). The Ninth Circuit position is, however, supported by language contained in *Beechum.*

The professed need for the evidence, however, must be properly presented by the Government to the trial court in order to determine the value of it, and its ability not to unfairly prejudice the jury against the defendant. As the Fifth Circuit stated in *Beechum:*

> Probity in this context is not an absolute; its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference . . . thus, if the Government has a strong case on the intent issue, the extrinsic offense may add little and consequently will be excluded more readily . . . if the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded.

United States v. Beechum, 382 F.2d at 914.

It is important to note that the Government, in the instant case, did not articulate the reason why such incredibly prejudicial evidence such as a wholly separate uncharged extortion was relevant on any issue before the Court. Searching the trial transcript for clues as to why the testimony regarding the Au incident was admitted lead inescapably to the conclusion that (1) It was offered to prove identity, and (2) It

was determined to be necessary in order to ensure a conviction. As stated by the trial judge:

> Well, it's my understanding from what I've heard, both in the previous case of Boon San Chong and this one, that the Au matter here in Plantation was close in time, we have identities of the parties, identity of the modus operandi, in a sense the same pattern of victims: Chinese restaurant family, same locality of greater Fort Lauderdale, both are adjoining suburbs, Wilton Manors and Plantation. So I think it's quite enough to handle. The Maryland matter is a little more fuzzy in my mind. It certainly is a little closer in time to the Lee matter.
>
> Would you put on the record please for the Court's benefit the Government's contention about similarity of perpetrators or victims. Criminals tend to stick to the same victim I understand, if they are same type criminals.

The trial judge was indisputably evaluating the probative value of the evidence relating to the Au incident based on its similarity as that pertained to the identity of the perpetrators. The Petitioner was never seen by any of the victims. The cooperating witness, Chung, identified the Petitioner as the "outside man." The clear inference from this testimony in the jury's eyes was to show that if the Petitioner committed one act, he committed the other one. The higher standard of similarity must prevail to show identity (or plan or *modus operandi*) than when intent is the only contested issue.

It was clear from certain comments by the trial court concerning the admissibility of the extrinsic offense evidence that his interpretation or the Government's need for the evidence was based on ensuring a conviction. For instance:

> Let me tell you, it couldn't have been any stronger [the case against co-defendant Go Yet Nam] than it was against Boon San Chung and I even kept out certain 404(b) material, to wit: the Maryland matter. And the other [Au] came in because he just said it up, handed it to the Government on a silver platter on cross-examination when he was testifying. And still, I though the only reason the jury was still out after 45 minutes of deliberation was because they were milking Uncle Sam for lunch and getting a free lunch out of the Government, some recompense for their being here six days after I told them it was a two-day trial. And they were out five hours or six, I've forgotten—well I sent them out 12:25 and they announced their verdict at 6:15 nearly six hours. I was flabbergasted, for the kind of case the Government put on. So that to me doubly underscores the impossibility of this mission we have under *Beechum*: trying to determine what is overkill or what unduly prejudices—because I didn't think the Government needed the Maryland matter at all. And I still haven't figured that one out. I'm going to have to talk with some of the jury to find out what happened. I've been waiting until this case is over before I do . . . the difference is I watched Chong

> keep a jury out six hours when the testimony was full bore from Chung and overwhelming testimony through the trial, and here there is no overwhelming testimony consequently, the Government needs the 404(b) on the Au residence and possibly the Maryland matter a lot more than it did against Chong.

As he stated on another occasion:

> One thing that's happening in the requirements under *Beechum,* that the Court balance the needs of the Government for the evidence under the evidence in the case. It is a requirement I find most difficult to determine, decide, because I'm not clairvoyant.
>
> However, as Mr. Chong plays games as he is doing, the Government's need for 404(b) material is increasing, mightily.

This statement by the trial judge was prompted by his personal observation that the cooperating witness Chong was "playing amnesia." Petitioner fails to understand how the inability of the Government to obtain the cooperation of their witness justifies the admission of unfairly prejudicial evidence about an uncharged crime.

The Ninth Circuit has required the Government to articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from other acts evidence. *United States v. Alfonso,* 759 F.2d 728, 739 (9th Cir. 1985); *United States v. Mehrmanesh,* 689 F.2d 822, 830 (9th Cir. 1982). As previously mentioned, if lack of intent is not the defense asserted, the probative value of extrinsic offenses relevant to

the issue of intent will be discounted in the Ninth Circuit. *United States v. Powell, supra.*

The Government's failure to have properly presented the issues upon which the trail court could justify the admission of evidence regarding the Au incident mandates a reversal. If such a finding is not required by the Eleventh Circuit, then this Court ought to accept certiorari for the purpose of determining whether such a rule is warranted. Given the expanded and practically unlimited use of extrinsic act evidence in Federal criminal trials, some safeguards need to be built into the system in order to ensure that the time-honored principle that a defendant can only be convicted if the evidence indicates that he is guilty of the crime charged is maintained. In the instant case, the lack of any limitation or limiting instruction and the trail court's insistence upon using improper criteria for the exercise of its discretion demands intervention by this Court to remedy the injustice caused thereby.

CONCLUSION

Upon the facts and authorities presented herein, the Petitioner, KIN SUN YUEN, respectfully requests this case be accepted for review by the Supreme Court for the United States in order to resolve the significant issue regarding the determination of admissibility of extrinsic offense evidence under Rule 404(b) of the Federal Rules of Evidence as exemplified by the injustice in the instant case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-5542

D.C. Docket No. 83-6117

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KIN SUN YUEN and GOH YIT NAM,
Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(December 31, 1986)

Before CLARK, EDMONDSON and KEITH,* Circuit Judges.

PER CURIAM: Affirmed. See Circuit Rule 25.

Judgement Entered: December 31, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: JAN 30 1987

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* Honorable Damon J. Keith, United States Circuit Judge for the Sixth Circuit, sitting by designation.